No. 16242

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY HUGHES,

Appellant,

v.

ROBERT A. HEINZE, Warden,
Folsom State Prison,

Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the Northern District of California, Northern Division

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ROBERT A. HEINZE, Warden,
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Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court for the Northern District of California, Northern Division

STATEMENT OF THE CASE

The appellant, Henry Hughes, filed in the United States District Court for the Northern District of California, Northern Division, on June 9, 1958, a petition for a writ of habeas corpus (TR * 1-30). The court on July 12, 1958, issued an order to show cause directed to Robert A. Heinze, Warden of the California State Prison at Folsom, returnable on June 23, 1958 (TR 31). On June 20, 1958, the Warden filed a

* TR refers to Clerk's Transcript of Record on Appeal.

"return to order to show cause and motion to dismiss" together with points and authorities in support of the return and motion (TR 31-37, 37-45). A copy of the judgment pursuant to which the petitioner was then confined in the State Prison was attached to the return as Exhibit A (TR 34-36). The petitioner on July 8, 1958, filed a motion for permission to proceed in forma pauperis and a traverse to the respondent's return (TR 45-51).

After a hearing on July 21, 1958, to which date the matter had been continued on July 7th, to permit the filing of a traverse, the District Court took the matter under submission, and on July 24, 1958, a memorandum and order was made and entered by the court denying petitioner's request for appointment of counsel and granting the warden's motion to dismiss (TR 52-55). On August 13, 1958, the District Court denied an application for a certificate of probable cause for an appeal (TR 70-71). The District Court on August 15, 1958, denied a petition which it treated as a motion for a rehearing on or reconsideration of petitioner's application for a certificate of probable cause (TR 71-72).

A petition for a certificate of probable cause was filed in this court and on October 7, 1958, the court in a *per curiam* opinion granted the certificate of probable cause and set aside the certificate of the District Court that the appeal is not taken in good faith.

Based upon the record before this court it appears that the appellant was convicted of the crime of burglary in the County of Orange, State of California, on June 20, 1952, after trial before the court without a jury upon an information filed by the district attorney. A copy of the judgment was attached to the return filed by the respondent in the District Court. No appeal was taken from the judgment.

A pleading in the nature of a petition for a writ of coram nobis was filed by the appellant in the State Superior Court in March, 1953. That petition, which was denied, did not raise the points now urged by appellant and no appeal was taken from the Superior Court's denial of the petition.

On July 23, 1953, the appellant filed a petition for writ of habeas corpus in the Supreme Court of the State of California (*In re Hughes,* Cal. Sup. Ct. No. Crim. 5509). This petition did not present any of the grounds now urged by appellant. Certiorari was not sought in the United States Supreme Court after the denial of this petition by the California Supreme Court.

On May 17, 1957, the appellant filed another petition for writ of habeas corpus in the California Supreme Court (*In re Hughes,* Cal. Sup. Ct. No. Crim. 6090). The grounds urged in that proceeding and which are also presented in the matter before this court were: (1) that the petitioner was denied a speedy trial; (2) that the trial court erred in ruling on the admissibility of evidence relating to

other crimes; and (3) that petitioner was denied his right to a jury trial which he did not effectively waive. Other points therein raised are not involved here. In opposition to the petition the Attorney General filed in the California Supreme Court certified copies of the clerk's and reporter's transcripts of the proceedings in the trial court and the State Supreme Court on September 18, 1957, denied the petition. Thereafter a petition for writ of certiorari was presented to the United States Supreme Court, which petition was denied (*Hughes* v. *California,* Misc. No. 370, 355 U. S. 964, 78 S. Ct. 554, 2 L. Ed. 2d 539). The record of the California Supreme Court proceeding was made available to the District Court and is before this court.

ARGUMENT

I. The Appellant Failed to Exhaust His State Remedies With Respect to All But Three of the Grounds Raised in the Petition

In his petition filed in the District Court the appellant presented seven grounds upon which he urged that the court should issue the writ. The appellant in his opening brief mentions an eighth point which is asserted to have been inferentially raised—the knowing use by the prosecution of perjured testimony (App. Brief, p. 20, ll. 4-19). We must confess to being unable by reading between the lines of the petition to find any such allegation. In any event this and the following four points set forth in the petition have never been raised in any

state court proceeding and particularly were not raised in the habeas corpus proceeding in the California Supreme Court (No. Crim. 6090) from which the appellant sought certiorari in the United States Supreme Court: That appellant was arrested without reasonable or probable cause and without a warrant, that the information upon which appellant was tried was filed without a required preliminary examination and after the charge had been dismissed upon a preliminary examination, that the appellant was not confronted with the prosecuting witness, and that the appellant was denied effective aid of counsel.

The appellant has not alleged any circumstance which would bring him within any exception to the requirement of exhausting state remedies. (28 U. S. C., sec. 2254.) The District Court was therefore required to dismiss the petition as to these points. (*Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; *Vanderwyde* v. *Denno,* 113 F. Supp. 915, aff'd. and opinion adopted 210 F. 2d 105, cert. den. 347 U. S. 949; *U. S. ex rel. Langer* v. *Ragen,* 237 F. 2d 827.) The requirement of exhaustion of state remedies must be met "except when there is an absence of an available state corrective process, or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" (*Darr* v. *Burford,* above cited, 339 U. S. at page 218). The Supreme Court

further stated in *Darr* v. *Burford,* 339 U. S. at page 218:

> "Flexibility is left to take care of the extraordinary situations that demand prompt action."

No such exceptional circumstances or need for prompt action is shown to exist here, and the District Court properly dismissed the petition as to these grounds.

II. The Allegations of the Appellant's Petition Do Not State a Justiciable Federal Question

The District Court had before it the appellant's petition, respondent's return, the traverse and the record of the California Supreme Court in the case of *In re Hughes* (Crim. No. 6090). The three allegations of the petition which had been previously presented to the state court were: (1) that petitioner had not effectively waived the right to trial by jury accorded him under state procedure; (2) that he was denied a speedy trial; and (3) that evidence of other crimes was erroneously received by the trial court.

A. THE PETITION FAILED TO SHOW THE DENIAL OF DUE PROCESS WITH RESPECT TO THE QUESTION OF WAIVER OF A JURY TRIAL

The appellant alleged in his petition for writ of habeas corpus that he was denied due process of law by reason of the fact that he had not effectively waived his right to trial by jury which was guaranteed to him under California law. He had previously raised this question in the state court in the case of *In re Hughes,*

Cal. Sup. Ct. No. Crim. 6090. The record of the Supreme Court in that case was made available to the District Court and is before this court. That record shows that at the time the appellant was brought to trial his counsel stated in open court that a jury trial had previously been waived in the department of the presiding judge. There was no objection on the part of the appellant to this procedure and he proceeded to trial before the court, sitting without a jury. There is nothing which positively shows that the appellant personally waived his right to a jury trial, although the statement of the counsel to the court implies that there had been a waiver of the right to a jury trial by counsel and by the appellant. The clerk's transcript, page 8, thereof, shows: "The defendant waived trial by jury." The State Supreme Court, in passing upon the petition for a writ of habeas corpus, impliedly found that the appellant had effectively waived his right to a jury trial guaranteed him under the State Constitution.

In any event, the appellee respectfully submits that the contentions of the appellant on this point do not raise a federal constitutional question. It has been held that the United States Constitution does not guarantee to defendants the right to a jury trial in criminal prosecutions in state courts.

In *Farrell* v. *Lanagan,* 166 F. 2d 845 (cert. den. 334 U. S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775) it was held that proof of the fact that petitioner did not realize what he had signed when he waived a jury trial in a

criminal prosecution in a state court did not show a denial of due process since the Federal Constitution does not prevent a state from completely abolishing trial by jury in criminal cases (citing: *Brown* v. *Mississippi,* 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674).

A similar case is *Tompsett* v. *State of Ohio,* 146 F. 2d 95 (cert. den. 324 U. S. 869, 65 S. Ct. 916, 89 L. Ed. 1424). In the *Tompsett* case a jury trial was waived by counsel in the presence of the defendant. The petitioner contended that he was denied due process of law. The Circuit Court of Appeals, in affirming the judgment of the District Court denying the writ of habeas corpus, stated as follows:

> "Generally, the Fourteenth Amendment to the Federal Constitution and the Constitution of the State of Ohio, art. 1, sec. 10, guarantee a person accused of crime certain rights of which he may not be deprived without his consent. Among these is the right to trial by jury, the right to appear in person or by an attorney, to have compulsory process to secure the attendance of witnesses in his behalf and to have a fair and impartial trial according to the method of procedure generally followed in courts in the trial of criminal cases. All of these enumerated rights are for the benefit of the accused. He alone is interested in them and under well-settled legal principles, the accused may waive those growing out of the Constitution, as well as irregularities occurring in the trial of the cause and such a

waiver may be shown by acts and conduct and also by non-action. Patton v. United States, 281 U. S. 276, 309, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 146; Adams v. United States ex rel. McCann, 317 U. S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435; Diaz v. United States, 223 U. S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

* * * * *

"* * * All of the misconduct of his attorney of which he complains occurred in open court and in the presence of the presiding judge, yet at no stage of the proceedings did appellant repudiate his counsel or manifest to the court his objection to or lack of concurrence in the procedure counsel was following. Under such circumstances it must be concluded that appellant intelligently waived trial by jury and consented to or ratified all other acts of his attorney of which he complains."

In *Ex parte Whistler,* 65 F. Supp. 40 (appeal dismissed 154 F. 2d 500; cert. den. 327 U. S. 797, 66 S. Ct. 822, 90 L. Ed. 1023), the court held that where an accused waives a jury trial in a state court he has been accorded due process (citing *Hallinger* v. *Davis,* 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986). In the case of *Sims* v. *Alves,* 253 F. 2d 114, the court held that the failure of a defendant to waive his right to a jury trial in writing as required by an Ohio statute did not establish grounds for his release upon habeas corpus in a federal court

on the ground that he had been denied due process of law.

It is respectfully submitted that the question of whether petitioner adequately waived his right to a jury trial is solely a matter of state procedure and presents no federal question (*Farrell* v. *Lanagan,* 166 F. 2d 845, above cited).

Since the question of effective waiver of a defendant's right to a jury trial presents a matter of state procedure, the decision of the California Supreme Court on this point should be held to be binding upon this court. The California Supreme Court did not, as contended by the appellant, summarily deny his petition. On the contrary, there was presented to the Supreme Court certified copies of the transcript of proceedings in the trial court and the Supreme Court after taking judicial notice of these records necessarily decided the issue of fact of whether or not the appellant had effectively waived his right to trial by jury guaranteed to him by state law. If this court or the Federal District Court were to decide this issue contrary to the holding of the State Supreme Court it would be deciding a question of state law contrary to a specific finding on this point by the state court. It is respectfully submitted that the appellant's contention concerning the waiver of his right to trial by jury presents a state question only. No federal question relating to denial of due process of law was presented to the District Court, and no issue of fact was raised.

Therefore that court was justified in dismissing the petition for writ of habeas corpus and the Warden was not required by the provisions of 28 U. S. C. Sec. 2243 to produce the appellant at the hearing when the petition and return presented only issues of law.

B. THE PETITIONER WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL

The reporter's and clerk's transcripts in this matter (see *In re Hughes,* Calif. Sup. Ct. No. Crim. 6090), as well as the allegations of the appellant herein, show that the appellant was brought to trial within 60 days after the filing of the information. He was therefore brought to trial within the time provided by statute (California Penal Code Sec. 1382 provides in effect that a defendant must be brought to trial within 60 days after the finding of the indictment or filing of the information). The fact that the appellant was brought to trial within 60 days, pursuant to the provisions of this statute, affirmatively shows that he was accorded due process of law, that the trial of this matter was not unduly delayed, and that he was not denied the right to a speedy trial.

In the case of *In re Sawyer's Petition,* 229 F. 2d 805 (cert. den. 351 U. S. 966, 76 S. Ct. 1025, 100 L. Ed. 1486) the petitioner was not brought to trial for more than a year after he was indicted and arrested. In holding the petitioner had not been deprived of any "right to a speedy trial" under the

Federal Constitution the court stated at pages 811-812 of 229 F. 2d:

> "The trial court was correct in holding that Sawyer was not denied rights given him by the Constitution because of any delay in bringing him to trial. It is clear that the Federal Constitution does not give an absolute right to a 'speedy trial' as such to persons tried in state courts. The Constitutional right to a 'speedy trial' is contained in the Sixth Amendment. It is common knowledge that the first ten amendments do not apply to state tribunals and that the Fourteenth Amendment, which does apply to the states, does not necessarily include all of the first ten. Wolf v. People of State of Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782; Adamson v. People of State of California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903. Before we can order the release of a state prisoner for failure to obtain a 'speedy trial,' we must be convinced that the failure resulted in the taking of the prisoner's liberty or property without due process of law.
>
> "The right to a speedy trial is relative and must always be judged by the surrounding circumstances. Beavers v. Haubert, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950; United States ex rel. Hanson v. Ragen, 7 Cir., 166 F. 2d 608. Under the circumstances shown by the record in this case the delay in bringing Sawyer to trial was not so unreasonable as to contravene his Constitutional rights."

The appellant in the present case has failed to show that he was in any way handicapped or deprived of due process of law by reason of the fact that two months elapsed between the filing of the information and his trial.

C. THE ALLEGATIONS OF THE PETITION WITH RESPECT TO ERROR IN THE ADMISSION OF EVIDENCE DO NOT PRESENT A FEDERAL QUESTION

The appellant herein contends that he was denied due process of law for the reason that the trial court permitted the prosecution to introduce evidence of the commission of similar offenses, which offenses were not charged in the information. It is unnecessary to extend this brief by extensive argument to support the proposition that proof of similar offenses is relevant and admissible in a criminal prosecution where such similar offenses establish a common plan or scheme, or tend to show the intent with which an act was done (see 18 Cal. Jur. 2d 585-590 and cases there cited).

It is well established that the application of rules of evidence in state courts does not present a question of due process under the Fourteenth Amendment of the United States Constitution. That constitutional provision does not impose rules of evidence on state courts.

In *Lisenba* v. *People of the State of California,* 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166, the court held that the question of whether the trial court properly admitted evidence of other crimes to show intent or a common plan or scheme did not present a question of

due process under the Federal Constitution. (See also: *Hoag* v. *State of New Jersey,* 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913; and *Ciucci* v. *State of Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983.)

It is respectfully submitted that there is no merit whatever in appellant's contentions that he was denied due process by reason of the fact that the trial court erred in its ruling on the admissibility of evidence. This is purely a matter for determination by state courts. The appellant was represented at the trial by counsel of his own choosing and there is no showing that counsel was incompetent or failed to adequately represent appellant with respect to matters relating to the conduct of the trial and the admissibility of evidence.

The allegations of the appellant in his petition filed in the District Court did not, therefore, present any federal question relating to the admissibility of evidence upon which the District Court had jurisdiction to act in a habeas corpus proceeding.

III. The Appellant Was Not Denied Due Process of Law by the Action of the California Supreme Court in Denying Appellant's Petition for a Writ of Habeas Corpus Without Granting Appellant a Hearing

In his traverse the appellant advanced an additional reason why the writ of habeas corpus should issue, to wit, that the California Supreme Court in denying his petition for writ of habeas corpus without granting him a hearing thereby denied him due process of law.

This court, in its *per curiam* opinion filed on October 7, 1958, granting the certificate of probable cause states that this point may possibly present a federal question and might involve an issue of fact (citing *Thomas* v. *Teets,* 205 F. 2d 236).

It is the appellee's contention that the California Supreme Court was not required to grant a hearing to the appellant in connection with the petition for writ of habeas corpus which was filed in that court. The contentions raised in the state court proceeding and which are again raised here relate to the question of whether the appellant effectively waived his right to trial by jury, whether he was denied a speedy trial as required by California statutes, and whether evidence was erroneously received by the trial court. All of these questions could have been raised by the appellant on an appeal from the judgment since all of them relate to matters which were of record before the trial court. By failing to appeal from the judgment the appellant waived any right to assert such contentions in the state courts and the California Supreme Court was justified in denying the petition for writ of habeas corpus on the ground that these contentions had been waived (*In re Seeley,* 29 Cal. 2d 294, 176 P. 2d 24; *In re Lindley,* 29 Cal. 2d 709, 177 P. 2d 918; *In re Manchester,* 33 Cal. 2d 740, 204 P. 2d 881; and see *Brown* v. *Allen,* 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469). In particular the California Supreme Court has held that the writ of habeas corpus is not available to

secure the discharge of a petitioner for failure to accord him a speedy trial where the petitioner is entitled to obtain his discharge under the provisions of California Penal Code, section 1382, for failure to bring him to trial within the required statutory period of 60 days (*In re Alpine,* 203 Cal. 731, 265 Pac. 947), or to review questions relating to the admissibility of evidence (*In re Lindley,* 29 Cal. 2d 709).

With respect to these last two points this court has already stated in its opinion of Oct. 7, 1958, that such points involve no question of due process under the Federal Constitution and hence no federal question of which the District Court could take cognizance. With respect to the contention concerning the effective waiver of the appellant's right to a trial by jury guaranteed by him by California law, the appellee has already set forth above its arguments in support of the contention that this point does not present a federal question.

The case of *Thomas* v. *Teets,* 205 F. 2d 236, cited by this court is not in point and is dissimilar upon its facts from the situation presented here. In *Thomas* v. *Teets* the petitioner had alleged in his petition filed in the State Supreme Court that he had been coerced into pleading guilty to the crime of murder by threats and inducements of the sheriff. This question involved an issue of fact which was entirely dehors the record. In order for the State Supreme Court to resolve this issue and accord the

petitioner due process of law it was necessary for that court to conduct a hearing. The reasoning of this court in *Thomas* v. *Teets* is exemplified by the following quotation at page 240:

> "Since the application alleged a violation of due process which was dehors the record of the state criminal proceeding, the supreme court was required to issue the writ."

It has been pointed out above that in the habeas corpus proceeding in the California Supreme Court that court had before it a transcript of the record in the trial court and took judicial notice of the contents of that record. Upon doing so, the court resolved the issue and held that under California law the petitioner had effectively waived his right to a trial by jury. This was purely a question of state law and was decided by the state court adversely to the appellant on adequate evidence and on state grounds. No federal question and no issue of fact was raised in this proceeding upon which the District Court was required to conduct a hearing.

CONCLUSION

It is respectfully submitted that the petition and other matters presented to the District Court in this case fail to raise any issue relating to denial of due process of law or any other ground on which that court was authorized to issue a writ of habeas corpus. The appellant had not exhausted his state remedies with respect to all but three of the contentions therein

raised and with respect to these latter points the record before the District Court conclusively showed that no federal question was presented and no issue of fact was raised. The question of waiver of a jury trial related solely to a matter of state procedure on which the State Supreme Court had already passed, and the arguments relating to denial of a speedy trial and erroneous introduction of evidence clearly presented no federal question. The District Court properly dismissed the petition and its order should be affirmed.

Respectfully submitted,

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